

The issue is whether the Office properly denied appellant's request for reconsideration as untimely filed and lacking clear evidence of error.

FACTUAL HISTORY

This is the third appeal in this case.¹ By decision dated January 5, 2007, the Board affirmed a February 23, 2006 decision which denied appellant's request for an oral hearing and a June 2, 2006 decision denying his request for reconsideration on the grounds that it was not timely filed and failed to establish clear evidence of error. By decision dated March 12, 2002, the Board affirmed an April 3, 2000 decision which denied appellant's request for reconsideration on the grounds that it was untimely filed and failed to demonstrate clear evidence of error. The law and the facts of the previous Board decisions are incorporated herein by reference.

On January 7, 2007 appellant requested reconsideration and submitted additional medical evidence. In a report dated July 6, 2006, Dr. Robert L. Cotton, a Board-certified otolaryngologist, provided a medical history and findings on physical examination. He indicated that appellant's previous physicians concluded that his hearing loss and tinnitus were secondary to noise exposure. Dr. Cotton stated that he had reviewed copies of appellant's audiograms over the years and found them to be stable. Appellant had bilateral tinnitus and high frequency hearing loss, greater in the left ear. Dr. Cotton stated:

"Due to the absence of other explanations from a neurologic or neurovascular standpoint, it is most likely that the sudden tinnitus and left ear neurosensory hearing loss were secondary to noise exposure."

By decision dated June 21, 2007, the Office denied appellant's request for reconsideration.²

LEGAL PRECEDENT

Section 8128(a) of the Federal Employees' Compensation Act³ does not entitle a claimant to a review of an Office decision as a matter of right.⁴ This section vests the Office with discretionary authority to determine whether it will review an award for or against

¹ Docket No. 06-1685 (issued January 5, 2007); Docket No. 00-2218 (issued March 12, 2002). On May 20, 1989 appellant, then a 44-year-old wood worker, filed an occupational disease claim alleging that he developed high frequency sensorineural hearing loss and tinnitus caused by hazardous noise exposure at work. The Office denied his claim by decision dated October 16, 1991 on the grounds that the evidence did not establish that his conditions were causally related to factors of his federal employment. An earlier portion of the case record was lost or destroyed due to eight years of inactivity in the case.

² The Office denied appellant's January 7, 2007 reconsideration request based on the criteria for a timely request for reconsideration. It incorrectly treated his reconsideration request as an appeal of the Board's January 5, 2007 decision, rather than an appeal of the last merit decision on his claim, the October 16, 1991 Office decision. The Office should have used the standard of review for an untimely request for reconsideration, *i.e.*, whether the evidence demonstrated clear evidence of error in the last Office merit decision.

³ 5 U.S.C. § 8128(a).

⁴ *Thankamma Mathews*, 44 ECAB 765 (1993).

compensation.⁵ The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority. One such limitation is that it will not review a decision denying or terminating a benefit unless the request for reconsideration is filed within one year of the date of that decision.⁶ The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).⁷

Section 10.607(b) states that the Office will consider an untimely application for reconsideration only if it demonstrates clear evidence of error by the Office in its most recent merit decision. The reconsideration request must establish that the Office's decision was, on its face, erroneous.⁸ To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.⁹ The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.¹⁰ Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.¹¹ It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.¹² To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.¹³ The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.¹⁴

ANALYSIS

The merits of appellant's case are not before the Board. His request for reconsideration was dated January 7, 2007, more than one year after the Office's October 16, 1991 merit decision, and therefore not timely. The issue to be determined is whether appellant demonstrated clear evidence of error in his untimely request for reconsideration.

⁵ *Id.* at 768.

⁶ 20 C.F.R. § 10.607; *see also Alberta Dukes*, 56 ECAB 247 (2005).

⁷ *Thankamma Mathews*, *supra* note 4 at 769.

⁸ 20 C.F.R. § 10.607(b); *see also Donna M. Campbell*, 55 ECAB 241 (2004).

⁹ *Dean D. Beets*, 43 ECAB 1153 (1992).

¹⁰ *Leona N. Travis*, 43 ECAB 227 (1991).

¹¹ *Darletha Coleman*, 55 ECAB 143 (2003).

¹² *Leona N. Travis*, *supra* note 10.

¹³ *Darletha Coleman*, *supra* note 11.

¹⁴ *Pete F. Dorso*, 52 ECAB 424 (2001).

The record reflects that the Office's merit decision on October 16, 1991 denied appellant's claim on the grounds that his hearing loss and tinnitus were not causally related to hazardous noise exposure at the employing establishment. Dr. Cotton stated that, due to the absence of other explanations from a neurologic or neurovascular standpoint, it was most likely that his tinnitus and hearing loss were secondary to noise exposure. However, Dr. Cotton did not indicate whether the noise exposure occurred at the employing establishment, or adequate medical rationale explaining how appellant's hearing loss and tinnitus were causally related to his federal employment if, in fact, the noise exposure was work related. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error. Dr. Cotton's report does not raise a substantial question as to the correctness of the Office's October 16, 1991 merit decision or demonstrate clear evidence of error.

For these reasons, the Office properly denied appellant's request for reconsideration.

CONCLUSION

The Board finds that the Office properly denied appellant's request for reconsideration. The Board hereby modifies the grounds for denial in the June 21, 2007 decision to reflect that appellant's reconsideration request was untimely and failed to demonstrate clear evidence of error in the October 16, 1991 Office merit decision.

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated June 21, 2007 is affirmed, as modified.

Issued: October 8, 2008
Washington, DC

Alec J. Koromilas, Chief Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board